COMMENCEMENT OF A CIVIL ACTION IN OHIO FOR APPLICATION OF THE STATUTE OF LIMITATIONS

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A cause of action is saved from the bar of the statute of limitations as soon as suit is "commenced."[1] It is not ordinarily difficult to determine the time of commencement for this purpose, for the Ohio Revised Code expressly fixes it. Section 2305.17 (11230, 11231) provides:

> An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive, and section 1307.08 of the Revised Code, as to each defendant, at the *date of the summons* which is served on him or on a codefendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action is commenced at the date of the first publication, if it is regularly made.
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> Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days. (Emphasis added.)

The section has presented problems of construction and application. In passing, it may be well to note that this section determines the time of commencement of the action *only* for the purpose of the statute of limitations,[2] and that *only* this section fixes the time of commencement for that purpose.[3] There seems to be some degree of confusion on this proposition, probably because Ohio Revised Code Section 2703.01 (11279) determines the time of commencement of the action for other purposes. This section reads: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to issue thereon."

The supreme court has said that this section provides the *manner* of commencing all civil actions,[4] but it is equally clear that it fixes the time of commencement for purposes other than the statute of limitations.[5]

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1 OHIO REV. CODE §2305.03 (11218): "A civil action, unless a different limitation is prescribed by statute, can be commenced only within the period prescribed in sections 2305.03 to 2305.22, inclusive, of the Revised Code. When interposed by proper plea by a party to an action mentioned in such sections, lapse of time shall be a bar thereto."

2 Rorick v. Devon Syndicate, Ltd., 307 U.S. 299 (1939) (construing OHIO GEN. CODE §§11230, 11231); Gehelo v. Gehelo, 160 Ohio St. 243, 116 N.E. 2d 7 (1953), dissenting opinion of Judge Hart. And see Consumers Plumbing and Heating Supply Co. v. Chicago Pottery Co., 155 Ohio St. 373, 98 N.E. 2d 823 (1951), note 47, *infra*.

3 Crandall v. Irwin, 139 Ohio St. 253, 39 N.E. 2d 608 (1942).

4 *Ibid.*

5 Rorick v. Devon Syndicate, Ltd., *supra* note 2; Templeman v. Hester, 65 Ohio App. 62, 29 N.E. 2d 216 (1940); Consumers Plumbing and Heating Supply Co. v. Chicago Pottery Co., *supra* note 2; 1 O. JUR., ACTIONS §41. *Cf.* Thrasher v. Kelley, 73 Ohio App. 304, 55 N.E. 2d 873 (1943).

Of course, summons must issue within the period of the statute of limitations; the date of the summons is the date of issuance,[6] and this date becomes the date of commencement, if the summons is thereafter served. But issuance of summons so dated does not, without service, commence the action and arrest the statute of limitations.[7]

WHEN THE FIRST SUMMONS IS SERVED.

In accordance with Section 2305.17 the action is commenced at the date of the summons which is served upon the defendant or upon a codefendant who is a joint contractor, or "otherwise united in interest with him." Service of the summons is therefore a necessary part of the commencement, although it does not occur until some time after the date so fixed as the commencement of the action, and though service occurs after the expiration of the statute of limitations.[8] Where publication is proper, the date of the first publication regularly made is the date of commencement,[9] notwithstanding the fact that the court does not acquire jurisdiction of the res until publication is complete.

Moreover, the commencement of the action by the plaintiff saves any proper counterclaim of the defendant from the bar of the statute of limitations, provided the statute of limitations has not run on the counterclaim at the date of commencement.[10] If the defendant's counterclaim arises out of the same event or transaction as the plaintiff's cause of action, it may very well be governed by the same statute of limitations. For example, in an automobile collision case both the plaintiff and defendant may have personal injury and property damage claims, all of which will be governed by the two year statute of limitations of Section 2305.10 (11224-1). A contrary rule would permit either party to delay suit to the last moment, secure service on a summons dated just before the statute expired, and then plead the bar of the statute to the claim of the other (who may have been willing to forego his claim to avoid litigation).

A further effect of the plaintiff's commencement by service upon one defendant, is to preserve his claim against all other defendants who are joint contractors with the defendant served, or who are "otherwise united in interest with him." This may be of considerable practical aid to the plaintiff in a case in which the necessary defendants are numerous, so that it is difficult to obtain individual service of summons upon them before the statute of limitations expires. If he can secure service of sum-

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[6] OHIO REV. CODE §2703.03 (11281).

[7] Kossuth v. Bear, 161 Ohio St. 378, 119 N.E. 2d 285 (1954); Crandall v. Irwin, *supra* note 3.

[8] McDonald v. Ketchum, 53 Ohio St. 519, 42 N.E. 322 (1895); Early and Daniels v. Gilliland Grain Co., 72 Ohio St. 600, 76 N.E. 1124 (1905).

[9] Pilgrim Distributing Corp. v. Galsworthy, 148 Ohio St. 567, 76 N.E. 2d 382 (1947).

[10] National Retailers Mut. Ins. Co. v. Gross, 142 Ohio St. 132, 50 N.E. 2d 258 (1943). And see Summers v. Connolly, 159 Ohio St. 396, 112 N.E. 2d 391 (1953), and Kocsorak v. Cleveland Trust, 151 Ohio St. 212, 85 N.E. 2d 96 (1949).

mons on at least one defendant of each necessary group whose interests so coincide as to make them "united in interest," his action is commenced as to the entire group, and he may thereafter perfect service on the rest of them and so bring them within the jurisdiction of the court for his relief. It may not be easy to determine whether the defendants not yet served are "joint contractors" or are "united in interest" with the defendant who has been served.

The supreme court has said that statutes of limitations should be liberally construed,[11] but the construction given these phrases is reasonably strict. Before the defendants will be held to be united in interest under Section 2305.17, their interest in the subject of the law suit must be nearly identical. For example, the supreme court has held that the vendor and vendee of real property are both necessary parties to an action to cancel a deed for fraud, but that they are not "united in interest" within the meaning of 2305.17.[12] In an action against joint mortgagors the defendants were held to be united in interest.[13] In an action for wrongful death against drivers of different automobiles, such defendants, as might have been expected, were held not to be "united in interest."[14]

The type of case in which this question most frequently occurs is the will contest. Here, of course, the heirs, attacking the will, are directly opposed in interest to the legatees and devisees who will take under it if it is supported. Rather clearly the heirs are not "united in interest" with the legatees and devisees. The executor takes his power and authority from the will, and to this extent at least his interest lies with that of the legatees and devisees. Moreover, since testators most frequently select as executor a member of the family who is also named legatee or devisee, and who would take as an heir in the event the will were set aside, it is often true that his personal financial interest and sympathy will align him in fact with the one side or the other when the will is contested.

In several cases the supreme court has considered whether the executor is "united in interest" within the meaning of Section 2305.17 with any of the other necessary parties to the suit, and in these cases has furnished the best available guide to interpretation of the phrase. In *McCord v. McCord*[15] all necessary parties were named defendant, but summons was requested and served only upon the executor. The plaintiff made an effort to secure service by publication on the heirs, legatees and devisees, but after the time then provided for bringing an action to contest the will had expired. He claimed that the service on the executor of summons dated before the statute of limitations expired constituted service upon all the defendants, but the action was held barred. The supreme court said that the executor, as such, is not united in interest either with the heirs or

[11] *E.g.*, Draher v. Walters, 130 Ohio St. 92, 196 N.E. 884 (1935).

[12] Moore v. Chittenden, 39 Ohio St. 563 (1883).

[13] Totten v. Lawton, 8 Ohio Cir. Ct. 377, 4 Ohio Cir. Dec. 518 (1894).

[14] Knight v. Schlachter, 28 Ohio App. 70, 162 N.E. 244 (1927).

[15] 104 Ohio St. 274, 135 N.E. 548 (1922).

with the legatees or devisees (here the executor was a bank which had no individual interest in the estate). Upon reaching its conclusion, the court held that the action was not commenced as against the other heirs or against the devisees or legatees by service upon the executor. In 1935 the supreme court decided *Draher v. Walters*.[16] In this case one of the legatees was served with summons within the statutory time, but the clerk of courts did not issue summons for the other legatees and devisees or for the executor. The plaintiff, discovering the omission, secured service on the other parties by alias summons issued after time for contest had expired, so that all necessary parties were in court, but the legatees claimed the bar of the statute of limitations. The court held that the initial service on one legatee commenced the action as to all the legatees-devisees, who were considered to be "united in interest" with him. And further, upon the principle of liberal construction, a majority of the court held that the timely service upon the one legatee was sufficient to commence the action against the executor, who was said to be the "shadow" which followed the "substance." Very little more is said in explanation of this decision, which either means that the executor was "united in interest" with the others, or that commencement of the action, as to him, was unimportant.

In the fairly recent case of *Peters v. Moore*,[17] the *Draher* case was overruled so far as it held the executor united in interest with the legatees and devisees. In this case the plaintiff mistakenly assumed that the executor nominated in the will had been appointed, and in filing his petition named the nominee as a party defendant. The nominee had declined, and a contingent executrix who was also an heir at law and a legatee under the will, had been appointed and was serving. The plaintiff obtained service on the assumed executor and on the person who was contingent executrix, but as an individual. After the date for instituting contest of the will had expired, plaintiff discovered his error, amended his petition to name the true executrix, and obtained service by alias summons upon her. There was thus presented the question whether the "official capacity" of the executrix was "united in interest" with her "individual capacity," so that the timely service upon her as an individual commenced the action as to the executrix. The supreme court held that the two positions which she occupied in the case were not "united in interest" and accordingly that the service of summons upon her as an individual did not commence the action against her as an executrix. Under the will involved in the case, the legatee-executrix would have received substantially all of the estate, whereas she would have taken half of it as an heir at law if the will had been set aside. Beyond noting these facts in the statement of the case the court did not comment upon it. (In the other two cases mentioned, the financial results to the parties involved are not even pointed out.) The court evidently does not consider actual benefit to be important.

[16] 130 Ohio St. 92, 196 N.E. 884 (1935).
[17] 154 Ohio St. 177, 93 N.E. 2d 683 (1950).

It is probably not safe to generalize from the cases so far decided what the term "otherwise united in interest" means in Section 2307.17. In the *McCord* case Judge Matthias said:

> The word "united" means joined or combined, made one; allied. "United in interest" means identity of interest, and that can exist only as to parties who would be similarly affected by the same general result of the litigation—in this instance, those benefited by the sustaining of the will, or those benefited by setting it aside. Codefendants are "united in interest" therefore only when they are similarly interested in and will be similarly affected by the determination of the issue involved in the action.[18]

It is clearly not enough that the codefendants be necessary parties in the case, and beyond that, it would not seem to matter that their natural advantage coincides, unless their legal rights will be affected by the determination in the same way.

WHEN THE FIRST SUMMONS IS NOT PROPERLY SERVED.

Assume that the plaintiff has caused summons to issue bearing a date before the statute of limitations expires, and that the sheriff is unable to serve it. If there is still time under the statute of limitations for the plaintiff to have an alias summons issued, which is thereafter served, he has, of course, commenced his action as of the date of the second summons.[19] And even though the statute of limitations on his cause of action has expired when he learns that his first summons has not been served, he has a further opportunity to get his case "commenced" if he can proceed under the second paragraph of Revised Code Section 2305.17 (11231). This reads: "Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days."

This section obviously leaves a good deal to interpretation; nowhere in the code is the word "attempt" defined, although common sense indicates that it means some effort to obtain service taken before the statute of limitations expires. By the terms of the statute, the party attempting to "commence" the action must diligently endeavor to procure service of his summons and must, in fact, obtain good service within sixty days. When he has complied with these requirements, the action is commenced at the date of the attempt. This savings clause does not purport to extend or toll the statute of limitations, although it is sometimes referred to as a "tolling."[20]

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[18] 104 Ohio St. at 279.

[19] Hubbard v. Geo. F. Alger Co., 51 Ohio App. 405, 1 N.E. 2d 325 (1935).

[20] *E.g.*, Annot. 27 A.L.R. 2d 242, 278 (1953). Accuracy of concept is of some importance. Where the limitation period is said to be a "part of the right," the right exists only through this period, and then is extinguished; it is not simply barred by plea of the statute, as in the case of "true" statutes of limitations. In other contexts, it is said that these periods cannot be tolled or extended. See Crandall v. Irwin, 139 Ohio St. 253, 39 N.E. 2d 608 (1942) involving foreclosure

It is well settled that the date of the attempt is the date of the summons issued even though not served, or, in other words, the date on which the action would have been commenced had the attempt been successful.[21] It follows that this sixty day period given the plaintiff to effect service after the initial failure runs from this same date, rather than from the date of the expiration of the applicable statute of limitations. As an example, if the plaintiff files his petition and praecipe for summons thirty days before the statute of limitations would run and the summons is issued dated the same day of his filing, and is not served, he must follow this attempt with service within sixty days from the date of the first summons, and if he does not get service until seventy days thereafter, the action is not commenced in time, even though service is had forty days after the statute of limitations had run.

The principal difficulty with application of this section has been to determine what is required of the plaintiff, or, in other words, when he has done enough to constitute an attempt, with diligent endeavor to procure a service. Certain mechanical steps are required as a result of a great many decisions. He must file his petition and praecipe for summons and *cause summons to issue* before the statute of limitations expires.[22] If he has not, he has not then made such an attempt as will be "equivalent to its commencement."

It is not enough that he has done all that he is required to do to put the machinery of service in motion by filing his petition and praecipe for summons. The supreme court long ago held that it is incumbent upon the plaintiff to see that summons is actually issued by the clerk in order to commence or "attempt" to commence the action;[23] and, although the clerk of courts is obligated by statute to prepare and issue the summons upon the filing of the praecipe, his failure or refusal to get it out in time does not excuse the plaintiff from his obligation to use due diligence to effect service.

In addition, the plaintiff must, it appears, make certain that the summons prepared by the clerk complies in all respects with the statutory requirements of a summons. If the summons prepared is defective, it may, of course, be set aside on that ground, although delivered to the defendant in such fashion as would otherwise constitute service. In such event, the action is not commenced. And, in at least one instance in which a de-

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of mechanic's lien; Sabol v. Pekoc, 148 Ohio St. 545, 76 N.E. 2d 84 (1947), concerning wrongful death action; Case v. Smith, 142 Ohio St. 95, 50 N.E. 2d 142 (1943) on will contest. In §2305.17 the question is avoided by dating back the time of commencement to the "attempt" which is within the limitation period.

[21] B. & O. R. Co. v. Collins, 11 Ohio Cir. Dec. 334 *affirmed without opinion,* 63 Ohio St. 577 (1900); Osmus v. Baumhardt, 47 Ohio App. 491, 492 N.E. 134 (1933); Bender v. Bender, 39 Ohio App. 547, 177 N.E. 920 (1931).

[22] McLarren v. Myers Admr., 87 Ohio St. 88, 100 N.E. 121 (1912); B. & O. R. Co. v. Ambach, 55 Ohio St. 553, 45 N.E. 719 (1896).

[23] McLarren v. Myers, Admr., *supra* note 22.

fective summons was issued within the period of the statute of limitations and was thereafter followed within sixty days by good service of a valid alias summons, the trial court, and its appellate court, held that the defective summons originally issued was not "legal summons," and that as a result the plaintiff had not made diligent efforts to procure service, and hence had made no such "attempt" as would permit him the relief of the sixty day saving clause.[24] In this instance the praecipe had not called for endorsement of the amount claimed in an action for money only, and the clerk therefore omitted the endorsement. In such case, of course, the plaintiff has been derelict himself, and initiated the error. Whether the same result would be reached in case the praecipe was in all respects regular, and the defect in the summons was the result of the clerk's mistake alone, may be debatable, but we do not believe it any safer to rely upon the clerk to prepare the summons correctly than it is to depend upon him to issue it promptly. If a "legal summons" (i.e., one which complies in all respects with the statutory requirements of the summons) must issue in order to constitute an "attempt" at service, and if it is incumbent upon the plaintiff to "cause summons to issue," any defect at all, however caused, may defeat him. The plaintiff's attorney who is so close to the expiration of his statute of limitations that he may have to depend upon the sixty day saving clause for timely commencement, might well check his praecipe for summons carefully, and after the filing of the petition and praecipe, wait for the clerk to prepare the summons, so that he can inspect it for style of the case, endorsement, signature, seal and date,[25] and see it physically submitted to the sheriff. If the summons is quashed for defect in any of these particulars, the plaintiff may find that he has not only failed to commence his action, but does not have the necessary summons upon which to predicate later service.

Supposing the plaintiff has made sure of each step, and knows that good summons is in the sheriff's hands for service, and in time, he has avoided the first risk, and even if he does not obtain service, he has at least made a timely attempt, and will have sixty days to obtain service by alias summons.

The sixty-day period will, in the ordinary case, suffice to give him notice of any defect with the service of summons. The sheriff's return is due on the second Monday after issuance of the summons if local service is attempted,[26] or on the third or fourth Monday after issuance if service has been directed to the sheriff of another county.[27] In practice the sheriff's return is usually made well before the day it is due. The plaintiff, if he inspects the return after it is filed with the clerk, will have a sub-

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[24] Crabbe v. Jones, 33 Ohio Op. 176, 17 Ohio Supp. 189 (1945); Crabbe v. Hertzig, 66 N.E. 2d 659 (1946).

[25] See OHIO REV. CODE §2703.03 (11281) prescribing requisites of summons.

[26] OHIO REV. CODE §2703.05 (11283).

[27] *Ibid.*

stantial part of the sixty-day period left for alias service if the return shows that service was not had, or if the return purports to show good service but is obviously defective, either in respect to what the sheriff actually did or in the way he reported what he did. The plaintiff may be able to satisfy himself that good service has in fact been had, and have the return amended to show it, or he may get out alias summons to be sure.

If the sheriff's return recites facts which constitute good service, plaintiff will expect the defendant to appear, and the appearance is due the third Saturday after the summons is returnable.[28] The appearance date for the defendant will therefore, in any event, still be within the sixty day period from the date of the summons, and if there is any defect in the return, plaintiff may learn of it by a motion to quash or other objection to the jurisdiction filed by defendant. He is put on notice of possible defect in the service if the defendant fails to appear at all.

Some cases have raised a question whether the plaintiff has exercised the necessary diligence to have the benefit of the sixty-day saving clause by waiting during this period without making further efforts to secure service upon alias summons. In *Armbruster v. Harrison*[29] the plaintiff filed his petition and caused summons to issue shortly before the expiration of the statute of limitations. After the statute had run, the defendant filed a motion to quash the summons, for a defect which the supreme court said should have been obvious to the plaintiff. Instead of causing alias summons to issue when the return of the sheriff was made, or even after the motion to quash was filed by the defendant, the plaintiff waited until the trial court had ruled upon the motion to quash, and when it was sustained, then filed his praecipe for alias summons, and in fact secured valid service within the sixty-day period. The defendant was arguing that the plaintiff's efforts had been less than diligent, because he should have known from the sheriff's return, and certainly did know from the filing of the motion to quash, that the service was defective or at least questionable, and that he thereby lost the benefit of the sixty-day saving provision. The supreme court held that the plaintiff was not required to take earlier action, because it was "an orderly course to wait until that service had been set aside before issuing an alias writ." In any event, the fact of service within sixty days shows some diligence, and we would expect that as long as proper service is had within the sixty-day period, the plaintiff will not be held to a strict accountability of his time and efforts to secure service during that period.

The really dangerous situation for the plaintiff is not the case in which the defect in the service of summons is apparent or is pointed out by the defendant's action, but rather the case in which the service of summons is apparently good, but for some reason not known to the plaintiff it is in fact invalid. A common situation is the case in which the

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[28] OHIO REV. CODE §2309.41 (11346).

[29] 116 Ohio St. 490, 157 N.E. 391 (1927).

sheriff makes a return showing service upon the defendant at his "usual place of residence." A large proportion of summonses are served in this fashion, unless the plaintiff insists upon service upon the defendant in person, for the sheriff, not finding the defendant at the address given for him in the caption of the case, will ordinarily leave the summons at that address, and report the service as accomplished. When defendant does not reside at that address, the service is not good. The defendant is likely not even to learn of the suit, and even though judgment be entered for his failure to appear, he can at any time thereafter have the judgment set aside.[30] The sixty-day period for service will, of course, long since have expired, and the plaintiff's action will be barred by the statute of limitations, as it was never actually "commenced."

The plaintiff can minimize the risk of this result by verifying the fact of defendant's residence before he designates it in the caption of the petition, and by giving special instructions to the sheriff with respect to service. Too many times, however, the defendant's address is taken from a police report, letterhead or other source of some age, which does not reflect the correct address at the time of attempted service. When plaintiff finds from the sheriff's return that residence service has been made, it is time that he make some independent check to be sure; it is decidedly unwise to depend upon the sheriff's recital.

An entry of general appearance by the defendant is, by statute,[31] equivalent to service upon him and, if he has not been served earlier, the action is commenced for application of the statute of limitations at the time of such entry of appearance.[32]

Accordingly, with the defendant's entry of appearance, plaintiff will feel some assurance that the action has been commenced, but there are instances in which even this may be misleading. In *Fiegi v. Loparkovich*[33] defendant was a minor, sued and served with summons as an adult. The petition was filed about a month after the accident which produced the plaintiff's injuries, so that the plaintiff had in nowise slept on his rights. Defendant filed a motion against the petition, without disclosing that he was a minor; and several months later filed a motion to quash the summons on the ground of his minority, which was thereafter sustained. The next step was the filing of an amended petition against defendant's guardian as the sole defendant; several other motions and pleadings were filed by the plaintiff and the guardian; but no correct service upon the defendant as a minor was attempted until after the statute of limitations had expired. A guardian ad litem was then appointed for the minor defendant and filed a motion to dismiss on the ground that

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[30] See Hayes v. Kentucky Bank, 125 Ohio St. 359, 181 N.E. 542 (1932).

[31] OHIO REV. CODE §2703.09 (11287).

[32] Crandall v. Irwin, 139 Ohio St. 253, 39 N.E. 2d 608 (1942); Russell v. Drake, *infra* note 36.

[33] 38 Ohio App. 338, 176 N.E. 670 (1930).

the action was barred by the statute of limitations. Both the trial and appellate courts held that the action was barred because the minor defendant was never properly served as a minor within the period of the statute, and as the minor was incapable of waiving compliance with the statutes relating to service, none of the motions filed by him or on his behalf nor his guardian's answer, constituted an entry of appearance. Accordingly, the action was commenced only when he was served, which was after the statute of limitations had expired.

In *Templeman v. Hester*[34] the court of appeals for Hamilton County had a similar case and came to the same conclusion on this point.[35] And in *Russell v. Drake*,[36] decided earlier this year, the court of appeals of Cuyahoga County divided in a similar situation on the question of whether the defendant's activity in defending during minority constituted such entry of appearance as would commence the action within the statute of limitations. The majority of the court held that where the defendant, a minor, was never served as a minor, the court did not acquire jurisdiction over his person, and the action was not commenced, until he filed a motion for continuance three days after the statute of limitations had run. The case is an unusual example of the "hidden defect" in service, and one cannot avoid some feeling of sympathy for the plaintiff. The petition had been filed and summons served upon the defendant as an adult, well within the statute of limitations. At the time of the accident giving rise to plaintiff's claim, defendant was married, and maintained his own home with his wife and child, and was almost 21 years old. When he was served with summons he was still not an adult, but leave to plead was taken without disclosing his minority. His answer did not disclose the fact. He then reached his majority, but did nothing further of record in the case until the motion for continuance, which occurred after the statute of limitations, had expired. He then raised the question of the statute of limitations by motion to dismiss, and for the first time plaintiff was apprised of the defective service. It was then barely too late.

These results may be necessary to accord to minors the protection intended for them by the legislature, but they represent a very real problem to the plaintiff in case there is any doubt as to the age of the defendant. An element of actual misleading of the plaintiff by the defendant is involved, and, while this might well deprive another of his right to plead the statute of limitations, the minor is not so affected. Here, again, the plaintiff ought not assume the action to be commenced simply because there appears to be no contest by the defendant of the court's jurisdiction over his person, or pleading of the statute of limitations.

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[34] 65 Ohio App. 62, 29 N.E. 2d 216 (1940).

[35] But found an escape for the plaintiff. See discussion *infra*, p. 150-1. And compare Haisman v. Crismar, 18 Ohio L. Abs. 180 (1934).

[36] 123 N.E. 2d 654 (1955).

THE EFFECT OF THE SAVING CLAUSE FOR CASES OF FAILURE OTHERWISE THAN ON THE MERITS

Section 2305.19 of the Revised Code (11233) provides in part:

> In an action commenced, *or attempted to be commenced*, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. . . . (Emphasis added)

Until recently, it has seemed probable that this section would apply to save the plaintiff from the unhappy result just mentioned, where he finds out that an apparently good service of summons was not served at all and his action was not commenced. The section would seem to admit this construction, since it says that it applies "in an action commenced, or *attempted to be commenced.*" This obviously refers to the "attempt" mentioned in Section 2305.17. Some of the courts of appeal have held that where summons is served upon the defendant, a motion to quash the service is sustained and the case dismissed for want of jurisdiction over the defendant, such dismissal was a "failure otherwise than on the merits" and this saving clause operated to give the plaintiff an additional year to start over again, without bar of the statute of limitations. In *Templeman v. Hester*[37] the court of appeals for Hamilton County held that, notwithstanding the fact no valid service of summons was obtained in time to commence the action under General Code Section 11230 (Ohio Revised Code Section 2305.17), the plaintiff would have a year to recommence under this saving clause if it were dismissed. The reasoning of the court is none too clear, but it must necessarily proceed from a conclusion that the action had been "attempted to be commenced" by the erroneous issuance of summons for the defendant as an adult within the statute of limitations, even though no proper service of summons was made within sixty days thereafter.

Haisman v. Crismar[38] involved another minor defendant served originally as an adult. In this case the defendant filed a motion to quash the service of summons on the ground of her minority, after the statute of limitations had run. The motion to quash was sustained and when she was thereafter served with summons in the case, she pleaded the statute of limitations. The court of appeals for Mahoning County held, on these facts, that the action was "attempted to be commenced" with the purported service upon the defendant as an adult and that the action was in fact commenced with the service of summons upon her after she

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[37] See note 34 *supra.*

[38] 18 Ohio L. Abs. 180 (1934).

attained majority and, although the statute of limitations had run, plaintiff's cause of action was preserved by Section 11233. The court regarded the order quashing the original summons to be a failure otherwise than on the merits, and since the valid service marking the commencement occurred within a year thereafter, said the case fell within the saving provision.

The only supreme court authority before these cases is the case of *Meisse v. McCoy's Administrator*.[39] In that case the summons dated and issued within the statute of limitations was served by the sheriff on the return day, and upon motion of the defendant the summons was quashed for this reason. Thereafter, within a year, but after the statute of limitations had expired, an alias summons was issued and served. At that time the statute comparable to Section 2305.19 did not refer to an attempted commencement, but applied where the action "has been commenced in due time." The defendant argued that without service, the action had not been commenced and that the saving provision could therefore not apply. The supreme court decided that the defective service was "only voidable" and "was sufficient to give the defendant a status in the case" so that the action was sufficiently commenced, and the sustaining of the motion to quash summons was such a failure, that the saving clause operated.

Last year the supreme court decided that case of *Kossuth v. Bear*[40] and threw the issue in doubt. Here plaintiff's cause of action arose from an automobile accident in Lorain County. Plaintiff first filed a petition in Cuyahoga County, where defendant apparently resided. The sheriff returned the summons "not found." Plaintiff then filed a petition in the Lorain County common pleas court just before the period of limitations expired, but the summons in this case was also returned showing no service had been made. More than three months after the statute of limitations had run, the Lorain County action was dismissed by the court without prejudice for failure of service. A month later the plaintiff filed an amended petition in Cuyahoga County, secured service upon the defendant under the provisions of the Non-Resident Motorists Act, General Code Section 6308-1 (Ohio Revised Code Section 2703.20), and claimed by this service to have commenced an action within one year after the dismissal of the Lorain County case which, he said, was a failure otherwise than on the merits. The defendant pleaded the bar of the statute of limitations, but the trial court and the court of appeals agreed with plaintiff that a case was made for application of the one year saving clause of Section 11233 (2305.19). The supreme court reversed and rendered final judgment for the defendant, on the ground that the case was not a proper application of the saving clause, since, it said, "No case ever matured in Lorain County to the point where the court had any

[39] 17 Ohio St. 225 (1867).

[40] 161 Ohio St. 378, 119 N.E. 2d 285 (1954).

jurisdiction over the defendant or had any power to make any order based upon the allegations of the petition so filed. There was no pending case to be 'dismissed.'" The case was obviously not "commenced" because of the want of service. Beyond this, the supreme court held that it was not "attempted to be commenced" *because there was no service within sixty days.*

It is not at all clear what the reference in Section 2305.19 to an action "attempted to be commenced" now means. Manifestly, if there has been an "attempt" followed by service within sixty days, the action is "commenced" under Section 2305.17, and there is no need in Section 2305.19 for any reference to an action "attempted to be commenced." It might be assumed that the phrase was included in Section 2309.19 to cover some situation other than an action commenced under Section 2305.17. At first glance at least, it would seem that *Kossuth v. Bear* strikes out of the saving clause for failure otherwise than on the merits the provision for actions "attempted to be commenced." It may be that the supreme court sees some difference between the case in which the defendant has been served with defective summons and the case in which defendant is not found at all, and would hold that the first instance constituted an attempt to commence. The case of *Meisse v. McCoy's Administrator*[41] did adopt the view that the summons which was actually served, although defective, had some effect in giving the defendant "a status in the case." The *Meisse* case, however, did not involve any determination of what constituted an attempted commencement, as the statute then in effect did not contain any reference to it. Further, the case was decided nearly 100 years ago. Finally, the supreme court in the *Kossuth* case made no mention of it.

On the other hand, if the saving clause of Section 2305.19 were applied to the situation in the *Kossuth* case, the result would seem incongruous. The plaintiff would only have to file his summons and praecipe and see that summons is issued within the period of the statute of limitations and wait until the court dismissed the case for want of service; he would still have a year from the dismissal to start all over again. If the legislature intended this result, there would not be much point to the second paragraph of Section 2305.17, as the plaintiff would not need this sixty-day grace period in any event.

It will be interesting to see whether the Ohio courts follow the *Kossuth* case where a purported service is made and is thereafter quashed. *Russell v. Drake*[42] was decided January 12, 1955, after the *Kossuth* case was reported. Here service on the minor was improper, but no motion to quash was filed. The court held that the action was not commenced until the entry of appearance by the defendant as an adult after the statute of limitations had run. The court had more than a little trouble

[41] See note 38 *supra.*

[42] See note 36 *supra.*

with the case. It quoted from *Templeman v. Hester*,[43] in which another court of appeals, before the *Kossuth* case, had held the saving clause upon failure otherwise than on the merits to be applicable, but distinguished that case, saying, "Under the facts of the case now being considered, a summons *legally sufficient* to bring the defendant into court was never issued or served." (Emphasis added.) The court then quoted the supreme court opinion in *Kossuth v. Bear*, but did not attempt to explain it. The dissenting Judge thought that the *Kossuth* case was not analogous. Neither the majority nor the dissenting opinion discussed the availablity to the plaintiff of the one year saving clause, although the majority in effect denied it to plaintiff. It does not seem possible to predict the future course of decisions on this point.

THE APPLICATION OF THE COMMENCEMENT SECTIONS TO CASES INVOLVING SPECIAL STATUTES OF LIMITATIONS.

There are many statutes of limitations in the Ohio code applying to particular actions which are not included within Chapter 2305 of the Revised Code, entitled "Jurisdiction; Limitation of Action." The sections of this title in general contain the limitations applicable to the common law actions with certain exceptions, saving provisions such as Sections 2305.17 and 2305.19, and tolling provisions. We might call these sections the general statutes of limitations, and those applying to specific statutory actions, the special statutes. Examples of such special statutes are the limitations on the wrongful death action in Sections 2125.02 and 2125.04, the action against a personal representative on a rejected claim in Section 2117.14, and the actions for workmen's compensation benefits, in Sections 4123.84 and 4123.85.

We have been examining Section 2305.17 which fixes the time of commencement either at the date of the summons served or of the date of the summons issued in an attempted service, where actual service is obtained in sixty days thereafter. If this section is read literally, it applies only to cases involving the general statutes of limitations. The first paragraph of Section 2305.17, which was Ohio General Code Section 11230, reads:

An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive, and section 1307.08[44] of the revised code . . . at the date of the summons which is served . . .

The second paragraph of Revised Code Section 2305.17, which was Ohio General Code Section 11231, reads:

> Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement. . . .

It would seem, accordingly, that these sections are intended to fix the

[43] See note 34 *supra*.

[44] This was a special limitation on certain actions against banks, which was formerly found in the chapter on "Limitations of Actions." Accordingly, when the recodification occurred, moving it to another chapter, the reference had to be retained to avoid change in effect of §11230.

date of commencement only for the purpose of the general statute of limitations, and that they would not apply to determine the time of commencement of actions limited by the special statutes.[45]

The difficulty with applying the section only to cases governed by the general limitations is this—if Section 2305.17 cannot be applied to determine when an action governed by a special limitation is commenced, there is no code provision which does, and we have no way of determining when such a special action is commenced, except perhaps by reference to Section 2703.01, providing that "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to issue thereon." Suppose an administrator files a petition joining two causes of action, one for the benefit of the estate for personal injuries and expenses resulting to his decedent, and the other for the wrongful death of the decedent. Although the two causes of action are governed by different statutes of limitations,[46] both afford a two-year period for commencement, and if both causes of action accrued on the same day, as frequently happens, both statutes of limitations will expire at the same time. Suppose further that the petition is filed close to the expiration date and summons issues within the limitation period but is not served, and no service is had within sixty days thereafter. If a court on these facts should apply Section 2305.17 literally, it would have to conclude that the cause of action for personal injuries was barred upon the expiration of the statute, but it could conclude that the wrongful death case was commenced with the issuance of summons. Or, if the plaintiff obtained service under favor of the sixty-day saving clause, the court would have to say that this saved the personal injury action, but that it was not available as to the wrongful death action.

Generally, the courts have avoided the question and have assumed that the provisions of 2305.17 apply beyond the chapter in which the section is found. Except for an occasional comment,[47] the question has not been much discussed. It was necessarily involved in the will contest

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[45] Section 11230 of the OHIO GEN. CODE read: "An action shall be deemed to be commenced *within the meaning of this chapter.* . . ." (Emphasis added.) Section 11231 provided: "*Within the meaning of this chapter* an attempt to commence an action shall be deemed to be equivalent to its commencement. . . ." (Emphasis added.) These sections had existed in substantially this form since the first Code of Civil Procedure of 1853 (51 Ohio Laws 57, c. 1202, §20) and were found in the chapter on Limitation of Actions. The question is therefore not created by the code revision.

[46] Section 2305.10 governs the personal injury claim, §2125.02 the wrongful death claim.

[47] *E.g.*, Judge Zimmerman's dissent in Draher v. Walters, 130 Ohio St. 92, at 98: "I am unable to see how Section 11230, General Code, has any bearing on a case of this kind. . . . The phrase 'within the meaning of this chapter' can only have reference to the chapter in which the section is found, entitled 'Limitation of Actions'. . . ."

cases discussed above[48] in which the supreme court was determining whether the executor was "united in interest" with the heirs or legatees, as only by assuming the application of General Code Section 11230 (2305.17) to a will contest case involving a special statute of limitations, could the question become important. If this section did not apply to save the plaintiff, his service upon one of a class was of no consequence as to the others in the class.

In 1942 the supreme court was faced squarely with the question, in a case that presented initially a somewhat different but comparable question. This was the interesting case of *Crandall v. Irwin*.[49] This was an action to foreclose a mechanic's lien under Section 8323-3 of the General Code (Revised Code Section 1311.19). Section 8321 (Revised Code Section 1311.13) required it to be commenced within six years from the filing of the affidavit for lien with the county recorder. Four days before the six-year period ran out, the petition was filed and summons issued. The summons was returned "not found," but about two years thereafter the defendants filed a waiver of summons and entry of appearance. Plaintiff claimed the six-year statute was tolled by the absence of defendants from the state by virtue of Section 11228 (2305.15), so that excluding the period of absence in the time computation, the entry of appearance fell within the six-year limitation. The court first had the question whether the tolling provision applied to statutes of limitations not found in the chapter on limitations, because Section 11228 read: "the period of limitation for the commencement of the action *as provided in this chapter* shall not begin to run until he comes into the state." (Emphasis added.) The supreme court held that the action was commenced too late because, among other reasons, the saving clause in question afforded relief only from the general statutes of limitations, and did not apply to extend the time for foreclosing a mechanic's lien. This apparently suggested to Crandall that if the tolling provision was limited by its language to the general statutes of limitations, General Code Sections 11230 and 11231, the sections fixing the time for commencement did not apply to his case either, because of similar limiting language, so that the failure to serve the summons had not prevented commencement of his action so long as it was *issued* in time. He filed an application for rehearing which was granted and made this contention. The supreme court then squarely faced our question, i.e., whether the statutes dealing with time of commencement apply only to cases involving the general statutes of limitations. In the syllabus of the opinion on rehearing the supreme court said:

> 1. Section 11279, General Code, prescribes the *manner* of commencing a civil action, i.e., by filing in the office of the

[48] 139 Ohio St. 253, 39 N.E. 2d 608, *on rehearing*, 139 Ohio St. 463, 40 N.E. 2d 933 (1942).

[49] McCord v. McCord, 104 Ohio St. 274, 135 N.E. 548 (1922); Draher v. Walters, 130 Ohio St. 92, 196 N.E. 884 (1935); Peters v. Moore, 154 Ohio St. 177, 93 N.E. 2d 683 (1950).

> clerk of the proper court a petition and causing summons to be issued thereon.
>
> 2. Sections 11230 and 11231, General Code, prescribe the *time* of commencing all civil actions. . . . (Italics are the Court's)

The effect of the decision, of course, is to strike out from Revised Code Section 2305.17 the apparent limitation "within the meaning of such sections" and to make the rules for determining commencement the same whether the action is a common law action or created by statute.

We believe the result is sensible, even though there is an apparent inconsistency in applying these sections to determine the time of commencement, and in refusing to afford the plaintiff the benefit of the tolling provisions. Other reasons are usually given for the refusal to toll the special limitations.[50]

While the court's statement that Sections 11230 and 11231 Revised Code Section (2305.17) prescribe the time of commencing all civil actions is too broad, in that the court does not say "for statute of limitations cases only,"[51] it is clear as a result of subsequent decisions that this is what it means.[52]

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[50] Primarily, that in statutory actions the limitation period is a part of the right and cannot therefore be tolled or extended. See note 20 *supra.*

[51] See cases cited note 2 *supra.*

[52] In Pilgrim Distributing Corp. v. Galsworthy, Inc., 148 Ohio St. 567, 76 N.E. 2d 382 (1947) and Consumers Plumbing and Heating Supply Co. v. Chicago Pottery Co., 155 Ohio St. 373, 98 N.E. 2d 823 (1951), the supreme court again had the question whether the action had been "commenced" so as to support attachment before summons was served. In the *Consumers Plumbing and Heating Supply Co.* case the defendant claimed that the attachment was premature when made after the summons was issued but before the first publication for service. It contended that Crandall v. Irwin had modified the earlier decisions which held attachment valid in such cases, so that service was now required in accordance with §2307.15, before the cause could be deemed "commenced" for *any* purpose. The court held that the action was commenced for purposes of attachment with the issuance of summons, reaffirming the decisions prior to the Crandall case, and noted that the Crandall case presented a question of the statute of limitations, thereby apparently distinguishing it.